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No.

IN THE

Supreme Court of the United States

SENIOR AIRMAN STEPHANIE R. TRAUM,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the standard set forth by this Court in *United States v. Davis*, requiring that a criminal suspect assert her Fifth Amendment right to counsel in an unequivocal manner, apply to a suspect's invocation of her right to remain silent.

II. Must a police interrogator scrupulously honor a criminal suspect's selective assertion of her right to remain silent when the suspect invokes that right with respect to specific details surrounding an alleged offense but otherwise agrees to answer questions during an interrogation?

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The petitioner, Senior Airman Stephanie R. Traum, respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Armed Forces, *United States v. Traum,* 60 M.J. 226 (C.A.A.F. 2004), is located at Appendix A, pp. 1a-27a. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Traum*, ACM 34225 (A.F. Ct. Crim. App. 28 June 2002), is located at Appendix B, pp. 28a-48a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 24 August 2004.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

STATEMENT OF THE CASE

Sometime between the night of 20 December 1998 and the morning of 21 December 1998, at Maxwell Air Force Base, Alabama, Senior Airman (SrA) Stephanie Traum's

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[1] Appendix A, p. 1a.

eighteen-month-old daughter, Caitlyn, died. On the morning of 21 December 1998, SrA Traum made a frantic phone call, requesting emergency assistance for Caitlyn because Caitlyn was not breathing. Medical personnel arrived at SrA Traum's residence a short time later and began efforts to resuscitate Caitlyn. Eventually, Caitlyn was transported by ambulance to the emergency room where she was pronounced dead by emergency room personnel soon after her arrival.

After Caitlyn's death, an autopsy was performed to determine the cause of death. The results of the autopsy were inconclusive as to the medical cause of death and remained so as of 13 January 1999.

In the weeks following Caitlyn's death, investigators from the Air Force Office of Special Investigations (AFOSI) focused their investigation on SrA Traum as a suspect in Caitlyn's death. Prior to 13 January 1999, the AFOSI detachment handling the investigation arranged for Special Agent (SA) Kraus, an AFOSI agent trained to conduct polygraph examinations, to travel to Alabama from his duty station in Florida to conduct a polygraph examination on SrA Traum. SA Krause arrived at Maxwell AFB on 12 January 1999 to conduct a polygraph examination on SrA Traum.

On 11 or 12 January 1999, SrA Traum contacted SA Gage of the AFOSI about the status of the investigation into Caitlyn's death. Prior to that date, she had contacted the AFOSI on other occasions seeking updates on the investigation. After Caitlyn's death, SrA Traum had applied for a humanitarian reassignment to an Air Force Base in Ohio. In order to process that assignment request, SrA Traum needed copies of the autopsy report and the death certificate for Caitlyn. She was attempting to obtain those documents through the AFOSI.

During the phone call on 11 or 12 January 1999, SA Gage told SrA Traum that he would call her back. SA Gage subsequently did call SrA Traum back and asked her to come in to the AFOSI office on 13 January 1999 to be updated on the status of the investigation. SrA Traum agreed to do so. SA Gage did not mention that he would be asking SrA Traum to submit to a polygraph examination when she came in.

On 13 January 1998, SrA Traum reported to the AFOSI office, as agreed, at approximately 0815 hours. When she arrived, she met with Special Agent (SA) Engelman and SA Gage and requested an update on the investigation. At that time she also requested copies of Caitlyn's autopsy report and death certificate to support her request for the humanitarian reassignment to Ohio. The agents and SrA Traum also discussed other topics, such as the condition of SrA Traum's other daughter, computers, AFOSI's relationship with the Alabama State Medical Examiner's Office, and other idle "chit chat." At no time during their conversation with SrA Traum did either agent advise SrA Traum of her right to remain silent pursuant to Article 31, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831,[2] or the Fifth Amendment to the Constitution. Their conversation lasted about 25 minutes.

After the initial "chit chat," SA Engelman asked SrA Traum to submit to a polygraph. SA Engelman told her that taking the polygraph could expedite the publishing of the medical examiner's autopsy report, the investigation,

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[2] Article 31(b), Uniform Code of Military Justice, 10 U.S.C. §831(b), states that "[n]o person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial."

publication of the death certificate, and, consequently, her humanitarian reassignment. In response to the request for a polygraph, SrA Traum stated that she "did not want to talk about the details of the night of 20/21 December 1998." In response, SA Engelman advised her that it might not be necessary to discuss all of the details of the night in question but that it might be necessary to discuss some of the "key details."

Agents Gage and Engelman then introduced SrA Traum to SA Kraus, who had not been in the room during the conversation between SrA Traum and the agents. SA Kraus escorted SrA Traum into a separate room to be interviewed and polygraphed. SA Kraus's interview of SrA Traum began at approximately 0850 hours. Before the interrogation began, SA Kraus advised SrA Traum of her rights in accordance with Article 31, UCMJ, and advised her that she was not required to submit to a polygraph. SrA Traum waived her rights at that time.

Over approximately the next eight hours, SA Kraus conducted a pre-interview, two different polygraph examinations, and a post-polygraph interview of SrA Traum. For the first several hours, SrA Traum repeatedly insisted that she did not kill Caitlyn. SrA Traum also suggested that her husband, John, may have killed Caitlyn on the night of 20 December 1998. After the second polygraph examination was completed, SA Kraus informed SrA Traum that she failed the polygraph with 99% certainty. He also falsely informed SrA Traum that investigation had revealed SrA Traum's fingerprints on the back of Caitlyn's neck in a position that suggested that SrA Traum killed her.

In his attempt to obtain a confession from SrA Traum, SA Kraus also suggested potential motives for killing Caitlyn. He suggested that SrA Traum killed Caitlyn either for the insurance money or because she was trying to protect

Caitlyn from abuse by Caitlyn's father. At approximately 1445 hours, SrA Traum confessed to killing Caitlyn by pushing her face into a couch cushion in the manner suggested by SA Kraus during the interview. SrA Traum also adopted one of SA Kraus's suggested motives, that she killed Caitlyn to protect her from abuse by Caitlyn's father. SrA Traum subsequently gave a written statement to that effect.

SrA Traum was tried by a general court-martial from 30 August 1999 to 17 September 1999 on a charge of premeditated murder in violation of Article 118, UCMJ, 10 U.S.C. § 918. At trial, SrA Traum's defense counsel moved to suppress her verbal and written statements made to SA Kraus on 13 January 1999. The defense argued that SrA Traum's constitutional right to cut off questioning was not scrupulously honored by the AFOSI investigators and that her statements were not voluntarily given. The military judge denied the defense motion. SrA Traum was convicted as charged and sentenced to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. On 25 July 2000, the convening authority approved the adjudged sentence, except the reprimand.

On appeal, the Air Force Court of Criminal Appeals concluded that the AFOSI agents did not violate SrA Traum's rights under Article 31, UCMJ, because agents Gage and Engelman's request that SrA Traum take a polygraph did not constitute interrogation and therefore did not require Article 31 warnings. The Court also held that SrA Traum's statement that she did not want to talk about the details of the night of 20/21 December 1998 was not an unequivocal invocation of her right to remain silent. The Court therefore upheld the denial of the defense motion by the military judge. Appendix B, pp. 33a-34a. The Court of

Appeals for the Armed Forces (CAAF) affirmed the decision of the Air Force Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

I. Does the standard set forth by this Court in *United States v. Davis*, requiring that a criminal suspect assert her Fifth Amendment right to counsel in an unequivocal manner, apply to a suspect's invocation of her right to remain silent?

When the AFOSI agents asked SrA Traum to submit to a polygraph examination, she specifically stated that she did not want to discuss the details surrounding the night her daughter died. Despite her assertion, the agents continued their concerted effort to convince SrA Traum to submit to interrogation by, among other things, telling her that it might be "necessary" to discuss some key details of the night in question. Ultimately, the agents convinced SrA Traum to submit to the polygraph and after approximately six hours of intensive interrogation, SA Kraus obtained a confession from SrA Traum.

The crucial question before this Honorable Court is whether the agents were required to cease any attempt to interrogate SrA Traum regarding the details of the night of 20/21 December 1998 after she made a statement that any reasonable police officer would have understood was an assertion of her Fifth Amendment right to remain silent with respect to the details surrounding Caitlyn's death.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court held that, when a criminal suspect is in the custody of the police or has had his freedom limited in any significant way, the Fifth Amendment requires that, prior to interrogating that suspect, police officers must advise her, among other things,

that she has the right to remain silent and the right to consult with an attorney. *Id.* at 479.

For purposes of this appeal, petitioner assumes, without conceding, that SrA Traum was not subjected to custodial interrogation. Further, the Court of Appeals for the Armed Forces (CAAF) held that SA Engelman's request that SrA Traum submit to a polygraph did not constitute interrogation under Article 31, UCMJ, because "an incriminating response was neither sought nor was it a reasonable consequence of SA Engelman's inquiry." Appendix A, p. 8a.

The CAAF correctly recognized that SrA Traum could invoke her Fifth Amendment right to remain silent in response to SA Engelman's request to submit to a polygraph even in the absence of a custodial situation. The CAAF noted, "[t]he right to remain silent 'protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.'" *Id.* (citing *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972)). This Court has plainly held that the privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar*, 406 U.S. at 444. Therefore, as the CAAF noted, "application of the privilege against self-incrimination is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime. Appendix A, p. 8a (citations omitted).

The CAAF went on to recognize that the standard set forth by this Court in *Miranda* applies to this case despite the non-custodial nature of the encounter.[3] The CAAF, citing

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[3] As the (then) Court of Military Appeals has recognized, Congress enacted Article 31, UCMJ, prior to this Court's decision in *Miranda* in recognition of the inherent pressures that exist in the military service.

this Court's precedent, has established that "[I]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease[.]" Appendix A, p. 8a (citing *United States v. Sager*, 36 M.J. 137, 145 (C.M.A. 1992) (quoting *Miranda*, 384 U.S. at 473)).

Ultimately, because SrA Traum had the power to assert her Fifth Amendment right to remain silent in response to the request that she submit to a polygraph, the CAAF observed that the crucial questions in the present case are whether SrA Traum's response to SA Engelman's question was an invocation of her right to silence, and if so, whether that right was "scrupulously honored." Appendix A, p. 8a (citing *Miranda*, 384 U.S. at 479).

In addressing the all important question of whether SrA Traum invoked her right to remain silent when she told SA Engelman that she did not want to discuss the details of the night Caitlyn died, the CAAF stated, "although no particular words or actions are required to exercise one's Fifth Amendment right to silence, we have held that its invocation must be unequivocal before all questioning must stop." *Id.* at 9a (citing *United States v. Sager*, 36 M.J. 137, 145 (C.M.A. 1992); *United States v. Schake*, 30 M.J. 314, 319

United States v. Ravenel, 26 M.J. 344 (C.M.A. 1988). In enacting Article 31, Congress sought to protect a military accused from "the subtleties of the superior-subordinate relationship and the conditioned response, consciously created from the first day of basic training, to respond almost unthinkingly to the wishes of a military superior..." *Id.* at 349. As a result of the inherent pressure associated with the military, the Court of Military Appeals has held that Article 31, UCMJ, is actually broader in its protections than the Fifth Amendment and the mandate of this Court in *Miranda*. *Id.* So although SrA Traum may not have been in custody when she was asked to submit to a polygraph, she was still subjected to the inherent military pressures to respond to questioning that Congress recognized as a significant danger to a military member's constitutional right to remain silent.

(C.M.A. 1990); *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989), *cert. denied*, 499 U.S. 949 (1991)).

Applying an unequivocal invocation standard to the assertion of the right to remain silent, the CAAF concluded that SrA Traum's words "did not unequivocally invoke her right to remain silent because, by stating that she did not want to discuss the details of the night Caitlyn died, she "did not foreclose the possibility that she was willing to take the polygraph and discuss other aspects of the investigation, such as the child's medical history or the manner in which Appellant cared for her child." *Id.* According to the CAAF, because SrA Traum was apparently willing to discuss some aspects of the AFOSI investigation, the AFOSI agents were not required to scrupulously honor her attempt to preclude any questioning regarding the details of the night of Caitlyn's death.

By holding that a suspect must unequivocally invoke the right to remain silent before police are required to cease questioning that suspect, the CAAF has essentially adopted the unequivocal standard set forth by this Court in *United States v. Davis*, 512 U.S. 452 (1994). In *Davis*, a case involving a suspect's request for counsel pursuant to this Court's decision in *Miranda*, this Court held that where a criminal suspect has been advised of his rights in accordance with *Miranda* and has knowingly and voluntarily waived those rights, law enforcement officers may continue questioning that suspect unless the suspect clearly and unambiguously invokes his right to consult with counsel.

Under *Davis*, if the suspect does invoke the right to counsel in an unequivocal manner during questioning, the police must immediately cease the interrogation until a lawyer has been made available or the suspect himself reinitiates a conversation with the police. *Id.* at 458 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). On the other

hand, if a suspect makes an equivocal or ambiguous reference to counsel, this Court held that the police are not required to cease questioning the suspect or even to clarify the ambiguous reference. *Id.* at 461-62.

Since *Davis* involved only the invocation of the right to counsel, this Court did not specifically address whether a valid invocation of the right to remain silent must also be unequivocal in order to be effective. To date, this Court has not specifically held that the unequivocal standard set forth in *Davis* applies beyond the context of a request for counsel to a suspect's assertion of the right to remain silent.

Since this Court's decision in *Davis*, most federal courts that have considered the issue have held that the *Davis* unequivocal assertion standard also applies to cases involving a suspect's assertion of the right to remain silent. Those courts have generally held that police investigators are not required to acknowledge or clarify an ambiguous or equivocal indication by a suspect that the suspect wishes to remain silent. Those courts, citing *Davis*, have held that an invocation of the right to remain silent must be unequivocal in nature before police questioning must cease. *See e.g., United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996); *Medina v. Singletary*, 59 F.3d 1095 (11th Cir. 1995); *United States v. Johnson*, 56 F.3d 947 (8th Cir. 1995); *Burkett v. Angelone*, 208 F.3d 172 (4th Cir. 2000); *Barnes v. Johnson*, 160 F.3d 218 (5th Cir. 1998). Although the CAAF did not specifically cite this Court's decision in *Davis* in applying the unequivocal invocation standard, the effect is the same.

Not every court, however, has applied the *Davis* unequivocal invocation standard to the right to remain silent. Several other Circuit Courts of Appeals have noted that this Court has not specifically applied the *Davis* standard in right to remain silent cases and they have therefore left the question open. *See e.g., James v. Marshall*, 322 F.3d 103

(1st Cir. 2003); *Evans v. Demosthenes*, 98 F.3d 1174 (9th Cir. 1996); *United States v. Ramirez*, 79 F.3d 298 (2nd Cir. 1996).

A. Applying an unequivocal invocation standard to the right to remain silent is inconsistent with this Court's interpretation of the Fifth Amendment.

This Court held long ago that the invocation of the right to remain silent does not require any "special combination of words." *Quinn v. United States*, 349 U.S. 155, 162 (1955). Instead, this provision "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479 (1951) (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)). Consequently, "even the most feeble attempt to claim a Fifth Amendment privilege must be recognized...." *Coppola v. Powell*, 878 F.2d 1562, 1565 (1st Cir. 1989), *cert. denied*, 493 U.S. 969 (1989) (citing *United States v. Goodwin*, 470 F.2d 893, 902 (5th Cir. 1972)).

In *Miranda*, this Court held that if after being informed of his right to remain silent, a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74 (emphasis added). This Court's use of the words "in any manner" is telling because it seems to clearly establish that there is no requirement that a suspect use any specific combination of words in order to successfully assert the suspect's constitutional right to remain silent.

By contrast, in *Miranda*, in setting forth the right to consult counsel, this Court simply stated, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. The lack of the same "in any manner" language in reference to a

request for counsel seems to indicate that this Court recognized some distinction in the manner in which a criminal suspect can effectively assert the two different rights in question.

A plain reading of the language in *Miranda* supports an argument that this Court did not intend to apply a strict and inflexible standard with respect to the actual language a suspect must use in order to invoke her right to remain silent. Combined with this Court's previous precedent interpreting the protections of the Fifth Amendment, it appears that application of a narrow, inflexible rule such as the unequivocal invocation standard set forth in *Davis* is inconsistent with this Court's interpretation of the Fifth Amendment.

In applying the *Davis* unequivocal standard to a suspect's attempted invocation of the right to remain silent, the CAAF and Circuit Courts of Appeals have undermined this Court's holdings in *Miranda* and *Quinn* and elevated form over substance in the crucial determination of whether a criminal suspect has asserted her right to remain silent.

If the *Davis* standard is held to apply to invocations of the right to silence, a suspect who says during custodial interrogation, "I think I want to remain silent," can be treated in a drastically different manner than a suspect who omits the first two words of the same sentence. Because the words "I think" can render the sentence somewhat ambiguous, it is likely that the suspect who uses the two additional words would be subject to continued interrogation by the police with no need to clarify whether the suspect actually wants to remain silent. The suspect could then cut off questioning only by mustering the courage to simply stop speaking to the police, despite the continued interrogation, or by somehow deducing that he must assert himself in a much more aggressive manner in order to effectively assert his rights.

Meanwhile, in accordance with *Miranda*, the more street-wise or savvy suspect who asserts his rights in a more direct fashion would have his right to remain silent fully honored.

An analysis of this Court's reasoning in *Davis* is helpful in addressing whether the unequivocal invocation standard should be applied outside of the narrow scope of a request for counsel. In reaching the holding in *Davis*, this Court reasoned that the rights established by *Miranda*, were simply "procedural safeguards . . . that were not themselves rights protected by the Constitution," but were instead, "measures to insure that the right against compulsory self-incrimination was protected." *Davis*, 512 U.S. at 457.

Since *Davis*, however, this Court has gone on to hold that the protections afforded by *Miranda* are in fact constitutionally required, and not mere procedural rules. *Dickerson v. United States*, 530 U.S. 428 (2000). Therefore, to the extent that this Court based its decision in *Davis* on the notion that the right to counsel set forth in *Miranda* is not constitutionally required, but only a procedural safeguard, that decision has necessarily been called into question by this Court's ruling in *Dickerson*. The acknowledgment that the rights set forth in *Miranda* are constitutionally required must necessarily lead to appropriate care in protecting and preserving those rights.

In *Davis*, this Court also reasoned that requiring police to cease interrogating a suspect who has made an equivocal or ambiguous request for counsel "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Davis*, 512 U.S. at 460. Of course the same criticism could be leveled at this Court's *Miranda* decision. In *Miranda*, this Court decided that it is more important under the Constitution to ensure that a criminal suspect is aware of his right to remain silent than it is to maximize the number of confessions obtained by law

enforcement in the course of investigating crimes. The same logic applies in no smaller degree to ensuring that a suspect understands what is required in order to assert the rights guaranteed by the Fifth Amendment. After all, it is of little benefit to a criminal suspect in custody to know their rights if they are left in the dark as to the exact means by which they are required to assert those rights.

This Court recognized in *Davis* that requiring a clear assertion of the right to counsel "might disadvantage some suspects who – because of fear, intimidation, lack of linguistic skills, or a variety of other reasons – will not clearly articulate their right to counsel. . . ." *Davis*, 512 U.S. at 460. Certainly, as this Court recognized in *Miranda*, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U.S. at 455.

Custodial interrogation necessarily "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. It was to combat these inherent pressures that this Court held that an accused must be "adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* In light of this Court's reasoning in *Miranda*, it is counterintuitive to allow an investigator to play hide-the-ball with a suspect who makes an effort to assert the rights she has been promised she enjoys by completely ignoring an arguably ambiguous attempt to assert those rights.

Another important consideration for this Court in *Miranda* was the necessity of advising suspects of their rights in language that ordinary citizens would understand: "the warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent – the person most often subjected to interrogation – the knowledge

that he too has a right to have counsel present. *Miranda*, 384 U.S. at 473.

As Justice Souter recognized in *Davis*, "criminal suspects who may (in *Miranda's* words) be 'thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures' . . . would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language . . . and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them." *Davis*, 512 U.S. at 469-70 (Souter, J., concurring).

Applying the *Davis* "unequivocal standard" to the right to remain silent has the ironic effect of requiring precision and clarity of verbal expression from those who either by nature or by circumstance are the least likely to assert themselves in a direct and unequivocal fashion. Additionally, there is no requirement under *Miranda* that the police actually inform suspects that they suspect must speak in unequivocal terms if they wish to invoke their right to counsel or to remain silent. Therefore, only those who are most educated or most street-wise are likely to assert their rights unequivocally. Such an approach is inconsistent with this Court's attempt in *Miranda* to ensure that those subjected to custodial interrogation are aware of their constitutional rights and actually serves to undermine that longstanding precedent.

The further danger in requiring an unequivocal assertion of the right to remain silent before police are required to cease an interrogation is the effect that police action in response to such an ambiguous assertion will have on the psyche of a criminal suspect. If a suspect who has been informed of her *Miranda* rights or her rights under Article

31, UCMJ, makes an arguably ambiguous effort to assert her right to remain silent, under the *Davis* standard the police could simply ignore the attempted assertion of rights and continue the interrogation unabated.

For someone already subjected to the inherently coercive pressures associated with custodial interrogation or submission to authority in the military, the appearance that the police have ignored an attempted assertion of the right to remain silent and have continued with an interrogation may lead the suspect to believe that those rights are not available or are illusory at best and provide no real protection. Such a result would seem to do no more than to increase the coercive pressures already visited upon the accused.

In this case, SrA Traum demonstrated a basic understanding that she had a right not to talk about the details of Caitlyn's death. Although she had not been advised of her rights, she made an effort to assert her right to remain silent. When SA Engelman refused to recognize her assertion and instead advised her that it might be "necessary" to discuss the key details of that night, SrA Traum was in the unenviable position of failing to successfully assert her rights despite her best efforts. It is therefore understandable that she may have been under the impression that she had no rights to invoke.

The apparent rejection of her right to remain silent, accompanied by the agents' feigned concern over her humanitarian reassignment and apparent willingness to help her very likely left SrA Traum in a more vulnerable state, an emotional state in which she was less likely to again attempt to assert herself in any meaningful way in the presence of her interrogator. Because the agents did not respect her initial assertion that she did not want to discuss the details of Caitlyn's death, SrA Traum certainly had no reason to

believe that they would do so if she made any further attempt to invoke her rights.

By essentially ignoring SrA Traum's assertion of her right to remain silent with regard to the details of the night of Caitlyn's death, the AFOSI failed to scrupulously honor her invocation of her right to remain silent. The CAAF's application on appeal of the unequivocal invocation standard further impinges upon SrA Traum's rights under the Fifth Amendment.

B. The *Davis* unequivocal invocation standard is more difficult for police officers to apply than a rule requiring clarification of ambiguous assertions of the right to remain silent.

One of the concerns expressed by this Court in adopting an "unequivocal" standard was that requiring police to terminate interrogation upon an ambiguous request for counsel would force police officers to make "difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. This Court noted that it's decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), established a bright line rule that is easy for police officers to follow: if a suspect requests counsel at any time during an interrogation, the interrogation must cease until a lawyer is provided.

Miranda also set forth a simple bright line rule: when a suspect indicates he wishes to remain silent, interrogation must cease. The difficulty in applying these seemingly clear rules is apparent when a suspect makes an arguably ambiguous reference to counsel or to remaining silent. Under the *Davis* rule, it is up to the police to make a determination about whether the reference is legally unequivocal. If the officer guesses that it is equivocal and

therefore proceeds with the interrogation, a court may later consider the same statement to be an unequivocal assertion of rights. In such a case, any evidence obtained as a result of the continued interrogation would likely be lost. But, if the police officer simply clarified the reference to remaining silent, any ambiguity could immediately be cleared up and the police officer would immediately know whether to cease questioning or to continue.

This Court has not alleviated the burden on police officers by leaving upon them the responsibility of determining what constitutes a sufficiently clear invocation of rights. The clearer bright line rule would be to require police officers to clarify any ambiguous attempt to invoke the right to remain silent. Such clarification is often the only way a police officer will be absolutely sure of the proper steps to take. A rule requiring such clarification would therefore go further both to protecting the constitutionally required rights set forth in *Miranda* and to ensuring that police officers are able to conduct an interrogation with a minimum of guesswork as to whether a suspect has actually asserted those rights.

Examining the facts of this case, it is easy to see how difficult the unequivocal invocation standard may be to apply in any given situation. SrA Traum's statement, "I don't want to discuss the details of the night of 20/21 December," is perfectly clear and contains absolutely no inherent ambiguity. She could not have been more direct in stating that she did not want to talk about her daughter's death. But the CAAF somehow found ambiguity in her assertion merely because she did not rule out the possibility of taking the polygraph or discussing subjects other than the details of the day Caitlyn died. Despite its ruling, the CAAF did not even suggest what alternate meaning SrA Traum's actual words may have had. Leaving open the possibility of talking about details other than those surrounding the events

of the night of 20 December simply cannot reasonably be deemed to render her statement capable of more than one interpretation.

The fact that the military appellate courts were able to find ambiguity in such a seemingly straightforward assertion highlights the difficulty inherent in applying the *Davis* standard to invocations of the right to remain silent. It is difficult to see how a police officer can effectively apply such a subjective standard when an unequivocal statement such as that made by SrA Traum can be deemed equivocal. The benefit of any bright line rule is lost if the police are left to decide what does or does not constitute an unequivocal assertion of rights.

This Court should grant this petition and resolve the question of whether application of the unequivocal invocation standard in the context of a suspect's assertion of the right to remain silent conflicts with the constitutionally protected rights recognized by this Court in *Miranda*. Because a rule requiring police officers to clarify an arguably ambiguous invocation of the right to remain silent serves the interests of both the Fifth Amendment and providing a clear bright-line rule for police, this Court should hold that the police must clarify any statement that would lead a reasonable police officer to believe that a suspect wishes to invoke the right to remain silent.

II. Must a police interrogator scrupulously honor a criminal suspect's selective assertion of her right to remain silent when the suspect invokes that right with respect to specific details surrounding an alleged offense but otherwise agrees to answer questions during an interrogation?

The Court of Appeals for the Armed Forces has, by its ruling, essentially adopted a test for ambiguity that conflicts

with an accused's Fifth Amendment right to selectively choose the topics an accused will or will not discuss during an interrogation. In doing so, the CAAF's decision undermined this Court's essential holding in *Michigan v. Mosley*, 423 U.S. 96 (1975).

In *Mosley*, this Court held that through the exercise of a suspect's option to terminate questioning a suspect has the right to control the subjects discussed during an interrogation. Further, this Court held that when a suspect selectively asserts the right to remain silent by limiting the subjects the suspect will discuss with the police, the police are required to "scrupulously honor" that assertion of rights. *Id.* at 103-04.

A suspect may selectively waive his right to remain silent in two ways. He may either tell the police that he will not discuss certain subjects or he may inform the police that he is only willing to discuss certain subjects. *United States v. Soliz*, 129 F.3d 499, 504 (9th Cir. 1997) (citing *Mosley*, 423 U.S. at 103-05; *United States v. Lopez-Diaz*, 630 F.2d 661, 664 (9th Cir. 1980)). "Once a person has indicated that he does not wish to talk about a particular subject, all questioning must cease." *Soliz*, 129 F.3d at 504.

In this case, SrA Traum specifically told SA Engelman that she did not want to discuss the details of the night that Caitlyn died. Even the Air Force Court of Criminal Appeals recognized that SrA Traum "just wanted to limit what she would talk about." Appendix B, p. 33a. Her statement was very clear. However, rather than recognizing her assertion of her right to limit questioning and scrupulously honoring that right, SA Engelman ignored her concern and indicated that it might be "necessary" to discuss key details.

In *Soliz*, the accused was under investigation for smuggling illegal aliens. When asked by police if he would

make a statement, he replied, "Yes, regarding my . . . citizenship." The police went on to exceed that limitation by asking him about the smuggling of illegal aliens. The Ninth Circuit Court of Appeals held that Soliz's statement constituted an unequivocal invocation of his right to remain silent and that the police did not scrupulously honor that invocation. *Soliz*, 129 F.3d at 504.

In *United States v. Lopez-Diaz*, the accused, after being advised of his *Miranda* rights, stated that he not want to talk about the drugs in his van but would provide other information. The police ultimately asked him about the drugs in the van and he made incriminating statements. The Ninth Circuit Court of Appeals held that by questioning him on a subject he specifically wished foreclosed from interrogation, the police did not scrupulously honor his right to remain silent. *Lopez-Diaz*, 630 F.2d at 667.

The facts in the present case are quite similar to the facts in *Soliz* and *Lopez-Diaz*. In both of those cases, the suspect did not rule out making a statement or discussing other aspects of the investigation. Instead, the suspects opted to selectively assert their rights by telling the police what they were or were not willing to discuss. In both cases, the police failed to scrupulously honor the limitations imposed by the suspects. Therefore, the Ninth Circuit Court of Appeals concluded that the police failed to scrupulously honor the suspects' assertion of their right to remain silent. Unlike the decision of the CAAF in this case, the Court in those cases did not conclude that the suspects' invocation of rights was equivocal simply because it was selective.

In *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001), the accused was investigated for her role in a rape. While being interrogated, she repeatedly stated that she did not want to talk about the rape. *Id.* at 515. The police officer ignored her protests and continued to question her about the rape

until she confessed. On appeal to the Michigan Court of Appeals, the Court concluded that the confession had been given voluntarily, noting that the accused had signed a form waiving her rights and indicating that she "wished to talk." *Id.* at 516.

On review of the accused's writ of *habeas corpus*, the district court judge found that the accused's statements that she did not want to talk about the rape were "unclear and ambiguous" because a reasonable police officer could have believed that the accused was merely indicating a hesitancy due to fear of retaliation. *Id.* The Sixth Circuit Court of Appeals noted that during her state trial, the trial court held her statements to be admissible "because she never said that she did not want to talk about subjects other than the rape." The Sixth Circuit Court of Appeals held that the trial court's decision was an unreasonable application of *Miranda* and its progeny.

The Court reasoned that although McGraw didn't ever say "I want to exercise my option to terminate this interview altogether if I will otherwise have to talk about the rape," her statement that she did not want to talk about the rape was not ambiguous. The Court reiterated that "no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination." *Id.* at 518 (citing *Emspak v. United States*, 349 U.S. 190 (1955)).

Petitioner's case is also similar to the facts in *McGraw*. Just as McGraw stated that she didn't want to discuss the rape, SrA Traum clearly indicated that she didn't want to talk about what occurred on the night of Caitlyn's death. Nevertheless, the AFOSI agents, like the police officer in *McGraw*, ignored her and conducted an interrogation where they specifically asked repeatedly about the very details SrA Traum did not want to discuss. Again, just as in *McGraw*, the CAAF held that SrA Traum's statement was ambiguous

because she did not rule out the possibility of discussing other aspects of the case. By doing so, the CAAF committed the same error recognized by the Sixth Circuit Court of Appeals in *McGraw*.

The reasoning of the Court of Appeals for the Armed Forces in this case is terribly flawed and the application of such reasoning in other cases will only serve to completely undermine the rights of suspects to selectively assert their right to remain silent. By holding that an assertion of the right to remain silent is ambiguous or equivocal simply because a suspect agrees to discuss other details of an investigation, the CAAF essentially negates the right to selectively waive or assert the right to remain silent as recognized by this Court in *Mosley*.

Under this line of reasoning, a suspect is essentially left with only two choices with regard to their right to remain silent when being interrogated: (1) refusing to answer any questions about anything at all; or (2) being subjected to unlimited questioning on any topic the investigator chooses. By equating a selective assertion of the right to remain silent with an equivocal assertion of rights, the CAAF has placed severe limitations on the power a suspect holds to selectively invoke their right to silence.

Under the CAAF reasoning, a police officer would rarely be required to honor a suspect's selective assertion of the right to remain silent so long as that suspect has agreed to discuss at least some aspect of the case with the interrogator. The police could conclude that the assertion was equivocal in nature and completely ignore the limitation. Certainly such a result is inconsistent with this Court's holding in *Mosley*.

In this case, by ignoring SrA Traum's wishes regarding the topic she did not want to discuss, the AFOSI agents violated her Fifth Amendment right to remain silent. If

police and courts can now ignore selective waivers or assertions of the right to remain silent simply because they are selective, and therefore deemed equivocal, this Court's precedents will be greatly undermined.

For the reasons set forth above, this Court should grant review of this issue and resolve the question of whether a criminal suspect has the right under *Mosley* to selectively assert the right to remain silent by limiting questioning on specific topics. The CAAF's decision, if it is permitted to stand, implies that any selective assertion of the right to remain silent is necessarily an ambiguous assertion of that right and therefore, the police have no obligation to scrupulously honor that assertion of the Fifth Amendment right to remain silent.

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant her petition for a Writ of Certiorari.

Respectfully submitted,

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November 2004

Appendix A

UNITED STATES, Appellee

v.

Stephanie R. TRAUM, Senior Airman
U.S. Air Force, Appellant

No. 02-0885

Crim. App. No. 34225

United States Court of Appeals for the Armed Forces

Argued October 21, 2003

Decided August 24, 2004

BAKER, J., delivered the opinion of the Court in which CRAWFORD, C.J., joined. GIERKE, J., filed an opinion concurring in part and in the result which EFFRON, J., joined. ERDMANN, J., filed a separate opinion concurring in part and in the result

Counsel

For Appellant: Lieutenant Colonel Craig S. Cook (argued); Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Kyle R. Jacobson (on brief); Captain Antony B. Kolenc.

For Appellee: Captain C. Taylor Smith (argued); Colonel LeEllen Coacher and Major John D. Douglas (on brief); Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Shannon J. Kennedy, and Major Jennifer R. Rider.

Judge BAKER delivered the opinion of the Court.

On September 17, 1999, contrary to her plea, Appellant was convicted by general court-martial of the premeditated murder of her infant daughter in violation of Article 118, Uniform Code of Military Justice [hereinafter UCMJ], *10 U.S.C. § 918 (2000)*. The sentence, adjudged by a panel of officer and enlisted members, provided for a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, a reprimand, and reduction to the lowest enlisted grade. Except for the reprimand, the convening authority approved the sentence as adjudged. The Air Force Court of Criminal Appeals affirmed the approved findings and sentence in an unpublished opinion. *United States v. Traum*, 2002 CCA LEXIS 153, No. ACM 34225, slip op. (A.F. Ct. Crim. App. June 28, 2002). We granted review to determine whether Appellant's confession to Air Force Office of Special Investigations (AFOSI) investigators should have been suppressed, and whether the military judge allowed the Government's expert witness to present inadmissible profile evidence against Appellant.[1] For the reasons that follow, we affirm.

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[1] The granted issues are:

I. WHETHER APPELLANT'S STATEMENTS TO SPECIAL AGENT KRAUS SHOULD HAVE BEEN SUPPRESSED BECAUSE:

A. THE REQUEST BY AGENTS OF THE AFOSI THAT APPELLANT SUBMIT TO A POLYGRAPH EXAMINATION CONVERTED THEIR DISCUSSION INTO OFFICIAL QUESTIONING DURING WHICH APPELLANT COULD INVOKE HER RIGHT TO REMAIN SILENT; AND

I.

The Confession of January 13

On the morning of December 21, 1998, base emergency medical personnel received a phone call from Appellant indicating that her eighteen-month old daughter Caitlyn was not breathing. During the call, Appellant suggested that the child might be having a seizure. Minutes later, medical personnel arrived at Appellant's quarters and began to treat the unresponsive child. The child was transported by ambulance to the hospital where efforts to revive her

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B. APPELLANT'S STATEMENT THAT SHE DID NOT WISH TO DISCUSS THE EVENTS OF THE NIGHT HER DAUGHTER DIED WAS AN INVOCATION OF HER RIGHT TO REMAIN SILENT, THUS REQUIRING THAT THE AFOSI AGENTS SCRUPULOUSLY HONOR HER REQUEST TO REMAIN SILENT.

II. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTION EXPERT WITNESS, DR. COOPER, TO TESTIFY AS TO INADMISSIBLE STATISTICAL PROFILE EVIDENCE AND TO VOICE A MEDICAL OPINION OF HOMICIDE LARGELY BASED UPON APPELLANT'S CONDUCT.

III. WHETHER THIS COURT SHOULD ORDER NEW POST-TRIAL PROCESSING WHERE THE STAFF JUDGE ADVOCATE'S RECOMMENDATION INCORRECTLY ADVISED THE CONVENING AUTHORITY ON THE MAXIMUM AUTHORIZED PUNISHMENT.

This third issue is resolved against Appellant in summary fashion at the end of this opinion.

continued. Despite the efforts of hospital personnel, Caitlyn was pronounced dead shortly after arriving at the emergency room. Appellant was home alone with the child at the time the emergency call was made.

In the weeks following the child's death, AFOSI investigators focused on Appellant as a homicide suspect. On January 12, 1999, Appellant called AFOSI to inquire about the status of the investigation of her daughter's death. The agents expressed a desire to discuss the investigation with Appellant at their office and she agreed to meet with them the following morning.

When Appellant arrived at the AFOSI office on the morning of January 13, she met with Special Agents (SA) Engelman and Gage and requested an update on the investigation. Appellant also informed them that she needed a copy of her daughter's autopsy report and death certificate in order to process her humanitarian reassignment. After further "idle chit chat," SA Engelman asked Appellant if she would be willing to take a polygraph. At first, Appellant neither declined nor accepted the invitation to take the polygraph. SA Engelman explained to Appellant that a possible benefit of taking the examination might be to rule her out as a suspect.

When asked again whether she was willing to take the examination, Appellant replied that "she did not want to talk about the details of the night of 20/21 December 1998." SA Engelman subsequently explained to Appellant that it might not be necessary to go into all of the details of that night, but it might be necessary to go into some of the details. The agent further explained that if Appellant still had concerns with talking about the details of that night, she could raise them with the polygrapher, SA Kraus. Appellant acknowledged that she understood this information.

Following this discussion, Appellant accompanied SA Kraus into a room to be interviewed and polygraphed. Prior to asking any questions, SA Kraus administered Appellant's

Article 31 rights and advisement. He also informed Appellant that she was not required to take the examination. Appellant waived these rights and agreed to be polygraphed and interviewed. There is no indication that at any time after the rights advisement, Appellant expressed her earlier concerns about discussing the details of the night of December 20 or the morning of December 21 to SA Kraus or anyone else.

After the polygraph examination, SA Kraus interviewed Appellant. During this interview, Appellant disclosed that she had killed Caitlyn by pushing the child's head into the couch and suffocating her. Appellant reduced this confession to writing and signed it. This written statement recounts that Appellant "gently pressed Cait's head into the couch" ostensibly to save Caitlyn from her father's abusive ways. Appellant included in her statement that she decided to take the child's life "around midnight on the 20 or 21st Dec. 98." When asked why she smothered the child as opposed to killing her in some other way, Appellant's written response was, "I didn't want her to hurt." At the time of the AFOSI interview, Appellant was a married, 25 year old E-4 with 6 1/2 years of service.

Prior to the trial on the merits, Appellant moved to suppress her confession to SA Kraus. In her motion, Appellant initially contended that because she was a suspect on the morning of January 13, her *Article 31* rights should have been read prior to the agents engaging in any conversation with her. For the purposes of this appeal, Appellant has narrowed her claim to an assertion that SA Engelman's question regarding taking a polygraph was designed to elicit an incriminating response. Therefore, according to Appellant, SA Engelman was required to warn her of her *Article 31* rights before asking this question. Appellant also contends, as she did at trial, that her response to SA Engelman's question that "she did not want to talk about the details of the night of 20/21 December 1998" was

an invocation of her *Fifth Amendment* right to remain silent. Further, Appellant asserts that her invocation was unequivocal and not honored, therefore, any statement taken after Appellant's response to SA Engelman's question regarding the examination was tainted and should have been suppressed.

A. The Requirement to Warn under *Article 31*

Appellant asserts that the agent's request for her to take a polygraph was either interrogation or a request for a statement within the meaning of *Article 31*.

No person subject to the UCMJ may "interrogate, or request any statement" from a person suspected of an offense without first warning that person in accordance with *Article 31(b)*. *Article 31(b)*, UCMJ, *10 U.S.C. § 831 (2000)*. "'Interrogation' includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Military Rule of Evidence 305(b)(2)[hereinafter M.R.E.]; *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980). M.R.E. 305(b)(2) was broadly fashioned "to thwart 'attempts to circumvent warnings requirements through subtle conversations.'" *United States v. Ruiz*, 54 M.J. 138, 141 (C.A.A.F. 2000)(quoting S. Saltzberg et al., Military Rules of Evidence Manual 225 (4th ed. 1997)). However, interrogation involves more than merely putting questions to an individual. Id.

We recognize that a request to take a polygraph may arise in a variety of circumstances related to interrogation. See *Wyrick v. Fields*, 459 U.S. 42, 74 L. Ed. 2d 214, 103 S. Ct. 394 (1982); *United States v. Applewhite*, 23 M.J. 196 (C.M.A. 1987).[2] In each instance, the question will be

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[2] Each of these cases can be distinguished from the present case. Both involved the custodial interrogation of individuals who had previously invoked their right to counsel. In Wyrick, the Supreme Court reasoned that by

whether an incriminating response is sought or is the reasonable consequence of the comment or remark. Of course, a rights advisement prior to such a question would remove the necessity for such analysis. Based on the context in which SA Engelman asked Appellant whether she would take a polygraph, we conclude that an incriminating response was not a reasonable consequence of SA Engelman's inquiry. In our view, the "reasonable consequence" of SA Engelman's question in the context presented was either yes or no. Similarly, we agree with the conclusion reached by the Court of Criminal Appeals that "no incriminating response from the appellant was sought . . . ." *Traum*, 2002 CCA LEXIS 153 at *9, No. ACM 34225. The polygraph and its operator were located in an adjacent room. SA Engelman's objective

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requesting to take a polygraph the defendant had "initiated dialogue with the authorities" such that interrogation could resume. *Wyrick v. Fields*, 459 U.S. 42, 48, 74 L. Ed. 2d 214, 103 S. Ct. 394 (1982). In Applewhite, the focus was on whether a previous invocation of the right to counsel had been honored or whether it had been undermined. There, the accused requested counsel, but investigators asked the accused to take a polygraph. Several days later he appeared prepared to do so. Prior to the examination he was confronted with new as well as previous allegations of wrongdoing. Whatever dicta may have been used in resolving the issue in that case, there was no holding that the mere request to take the polygraph was intended to elicit an incriminating response. Rather, in the words of Judge Cox, "After appellant invoked his right to counsel, the investigator sought to circumvent the exercise of that right by requesting appellant to take a polygraph examination." *United States v. Applewhite*, 23 M.J. 196, 199 (C.M.A. 1987). Interrogation of Applewhite occurred when he returned several days later to actually take the examination. *Id.* Significantly, Appellant in this case was neither in custody nor had she invoked her right to counsel.

was to encourage Appellant to take the polygraph not to ask questions that might serve as an investigative substitute for what the agents hoped to garner from the administration of the polygraph exam. Thus, we conclude that an incriminating response was neither sought nor was it a reasonable consequence of SA Engelman's inquiry.

B. Right to remain silent

We next determine whether Appellant's response to SA Engelman's question was an invocation of her right to silence, and if so, whether that right was "scrupulously honored." See *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). While SA Engelman's question was not interrogation as measured under *Article 31*, Appellant could nonetheless invoke her *Fifth Amendment* right to silence in response to the question. The right to remain silent "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972). "Application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime." *United States v. Alameda*, 57 M.J. 190, 199 (C.A.A.F. 2002). See also *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States v. Brunson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997, 118 L. Ed. 2d 411, 112 S. Ct. 1702 (1992); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989), *cert. denied*, 493 U.S. 969, 107 L. Ed. 2d 383, 110 S. Ct. 418 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017 (7th Cir. 1987).

This Court has established that "if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease[.]" *United States v. Sager*, 36 M.J. 137, 145 (C.M.A. 1992)(quoting *Miranda*, 384 U.S. at 473). This

important principle is incorporated in the Manual for Courts-Martial as well. "If a person chooses to exercise the privilege against self-incrimination . . . questioning must cease immediately." M.R.E. 305(f)(1). Although no particular words or actions are required to exercise one's *Fifth Amendment* right to silence, we have held that its invocation must be unequivocal before all questioning must stop. *Sager*, 36 M.J. at 145; see *United States v. Schake*, 30 M.J. 314, 319 (C.M.A. 1990); see also *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2d Cir. 1989), *cert denied*, 499 U.S. 949, 113 L. Ed. 2d 471, 111 S. Ct. 1419 (1991).

Appellant's response that "she did not want to talk about the details of the night of 20/21 December 1998" did not foreclose the possibility that she was willing to take the polygraph and discuss other aspects of the investigation, such as the child's medical history or the manner in which Appellant cared for her child. Thus, Appellant's words did not unequivocally invoke her right to remain silent.

SA Engelman, who was not assigned to administer the polygraph, informed Appellant that she might not have to talk about all the details of that night, but that she was free to raise her concerns with the individual administering the examination. The military judge found Appellant understood this advice. Later at the interview with SA Kraus, Appellant had the opportunity to do as SA Engelman had advised. Instead, Appellant voluntarily decided to take the examination. This decision was made after being informed of, and waiving, her right to counsel and her right to remain silent, as well as after being informed of her right to refuse the polygraph examination. Based on these facts, the military judge concluded that Appellant made an informed decision to waive her rights before making any admissions to SA Kraus and that her statement was voluntary. We agree. Therefore, the military judge did not abuse his discretion in admitting Appellant's confession.

II

Expert Testimony at Trial

A. Background

The Government's case on the merits was comprised of Appellant's confession, testimony from the emergency first responders, the medical examiner, a forensic pediatrician, and several witnesses who described Appellant's inappropriate grief response.

Unsuccessful in its efforts to suppress the confession, the defense proceeded at trial on the theory that Appellant's statement of January 13 was the false product of the agents' efforts to induce Appellant into making a statement. The defense also suggested during its opening statement that the child may have died as a result of a seizure; a possibility the defense maintained could not be eliminated beyond a reasonable doubt by the Government. Finally, the defense attacked the credibility and competence of the Government's medical examiner.

This issue focuses upon the testimony of the Government's forensic pediatrician Dr. Cooper. Dr. Cooper was called by the Government to discuss child abuse in general and in the words of trial counsel, to help the members understand how "parents can kill their children. " The defense moved in limine to preclude the witness from offering what it felt was inadmissible profile evidence and evidence of parental behavior that should otherwise be the subject of eyewitness rather than expert witness testimony.

1. The Article 39(a) session

At a session pursuant to Article 39(a), UCMJ, *10 U.S.C. § 839(a) (2000)*, Dr. Cooper presented her qualifications and experience to the military judge.[3] She then testified about

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[3] Dr. Cooper previously served as the assistant chief of pediatric service at Schofield Barracks, the chief of

child abuse and maltreatment as it pertained to inflicted injuries on children. During this session, trial counsel asked Dr. Cooper how one arrives at a diagnosis of fatal child abuse. The doctor responded in part:

> The most important aspects are the history as given by the family or whoever was in sole custody of the child. This is just critically important and there is no form of medicine, typically, that proceeds without a history. . . . And what is really critical in that history is consistency of the history. If a physically custodial person who presents with a child to an emergency room environment gives a history that, over that night or over the subsequent days to weeks, changes, you have to be very concerned regarding the fact that this may be an inflicted injury.
>
> . . . .
>
> The second thing we look at is the behavior of the parents or whoever are the custodial people. The behavior of the person taking care of the child is very telling with respect to whether or not they are exhibiting concern for the well-being of the child. . . . The behavior and demeanor of the parent or the custodial care provider at the time the child presents to the hospital is an important fact and one which is to be documented in the medical record.

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pediatrics at Womack Army Medical Center, Deputy Commander for clinical services, pediatric representative on the Family Advocacy Case Management Team, instructor at the Army Medical Education Department, and member of the Department of Defense Child Fatality Review Committee. At the time of trial, she was the primary forensic pediatrician for Cumberland County.

> Finally, the physical examination, which may reflect exactly what happened at the time when you are in the emergency room environment, but may actually, ultimately, require the evaluation and determination of a medical examiner. In certain types of child maltreatment deaths, the physical examination or the findings on the autopsy may not be one hundred percent clear as to what has happened to the child. This is particularly the case in suffocation or asphyxiation type deaths . . . .

Dr. Cooper went on to explain that this tripartite methodology - history, parental/custodial behavior, and examination - was relied on by "numerous specialists in the field." She then named some of these "specialists," including several forensic pediatricians whom Dr. Cooper described as "well-known" authorities in their field as well as certain law enforcement professionals.

Trial counsel then shifted the focus of Dr. Cooper's testimony to the area of single episodes of child abuse versus multiple episodes. Relying on a work by a Dr. James A. Monteleone entitled Child Maltreatment (2d ed. 1998), which Dr. Cooper considered an authoritative reference, she testified that "in eighty percent of fatal child abuse cases, that fatal event is the first time that that child has ever been abused." Next, relying on a report by the Advisory Board on Child Abuse and Neglect,[4] Dr. Cooper testified that according to the report "the people most likely to kill children are their biological parents - overwhelmingly so."

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[4] The U.S. Advisory Board on Child Abuse and Neglect was established under Pub. L. No. 100-294, section 103, of the Child Abuse Prevention and Treatment Act, amendments of 1988. The report referenced by Dr. Cooper is entitled, A Nation's Shame: Fatal Child Abuse and Neglect in the United States (1995).

Citing to professional literature in her field, Dr. Cooper further testified that there are two different categories of predisposing factors to child abuse and neglect - one category pertaining to the child and one pertaining to the adult. Regarding the category relevant to the child, Dr. Cooper stated that "the leading cause of trauma death, now, in the United States, for children under the age of four, is child maltreatment." She then discussed the adult category that included such factors as the presence of substance abuse, the presence of biological parents as opposed to step-parents and babysitters, and whether the child was in a military family setting.

Finally, following Dr. Cooper's testimony pertaining to the methodology that considers history, behavior, and physical examination, trial counsel sought Dr. Cooper's ultimate opinion as to Caitlyn Traum's cause of death. Before doing so, however, trial counsel asked Dr. Cooper what evidence and documents she reviewed in forming her opinion. She stated that she reviewed Caitlyn's medical records, Caitlyn's sister's medical records, and the investigation reports that included Appellant's confession, the emergency medical responses, Family Advocacy records, and the autopsy reports. She then opined, "I feel that her cause of death is homicide or an inflicted fatal child abuse." Dr. Cooper added that she believed the child died as a result of inadequate oxygen consistent with asphyxiation and that Caitlyn "was asphyxiated through a suffocation method." Her reasoning was as follows:

> The reason that I believe that is, first of all, the child died in a manner that cannot be explained by Sudden Infant Death Syndrome or any other obvious medical cause. . . . The second reason that I believe this is the case is because the history given by the custodial person-in this case, her mother-varied from the time she talked to the EMS personnel to the time that she talked

> to the individuals at the hospital, a very key element.
>
> . . . .
>
> . . . She gave a different history as to what had happened to the child. Whenever you see a change in history as to what has happened, that is a very critically important element when you're trying to decide if this is an accidental versus inflicted injury. And then the third reason that I believe this is because this child had trauma to her upper lip. Now, I understand that this patient underwent significant resuscitation efforts, but I have most certainly seen and evaluated suffocation victims-death cases-where children were suffocated to death, who had similar injuries to the inner aspect of their upper lip.

Following the testimony presented at the *Article 39(a)* session, defense counsel challenged Dr. Cooper's tripartite methodology. The defense focused on Dr. Cooper's use of the victim's history as well as her use of the behavior of the custodial parent. Defense counsel also argued that Dr. Cooper's consideration of Appellant's inconsistent history regarding Caitlyn's condition amounted to an expert's assessment of Appellant's credibility and was therefore impermissible. Finally, the defense asserted that Dr. Cooper's reliance on Appellant's alleged inappropriate grief response was inadmissible character evidence because it portrayed Appellant as a bad parent. While defense counsel suggested that the doctor's opinion was based on only one aspect of Appellant's conduct, her grieving reaction, Dr. Cooper steadfastly insisted that this factor was merely one of a number of factors considered in the "whole assessment when you look at the history, behavior, physical examination and autopsy finding."

After taking Dr. Cooper's testimony at the *Article 39(a)* session, the military judge heard argument from both sides as to their view of the permissible parameters of Dr. Cooper's testimony before the members. The military judge then ruled that he would allow Dr. Cooper's testimony regarding child abuse in general, her testimony regarding single episode versus multiple episodes of child abuse, her statement that biological parents are the most likely to fatally abuse their children, and the factors relevant to history, behavior, and physical examinations relied upon by experts in diagnosing fatal child abuse. The military judge reasoned that this testimony would be allowed because "it is counterintuitive for a parent to kill their eighteen month old child, based on the facts that have come out so far."

The military judge also ruled that the expert would not be allowed to testify regarding the so-called adult category of predisposing factors of child abuse. The judge prohibited such testimony because he felt it got into profile evidence and ran "awfully close to the types of things that the courts have found to be error." He also ruled that the witness would not be allowed to testify about a typical grieving parent's reaction as contrasted against that of a non-grieving parent. The judge reached this decision because "the [M.R.E.] 403 [prejudice] aspect here outweighs the probative value for the members."

Finally, the judge determined that Dr. Cooper would not be permitted to render her opinion that the cause of death was inflicted fatal child abuse. However, he did rule that the witness could give her opinion that the cause of death was non-accidental asphyxiation. After further discussion, defense counsel indicated that he understood the military judge's ruling, but indicated his objection to the testimony still stood. Thereafter, the military judge concluded the *Article 39(a)* session.

2. Dr. Cooper's testimony before the members

During the trial before the members, trial counsel elicited testimony from Dr. Cooper consistent with the rulings by the military judge. In particular, she testified, "Overwhelmingly, the most likely person to kill a child is going to be his or her own biological parent." Dr. Cooper also testified that "if a child is less than four years of age, the most common cause of trauma death is going to be child maltreatment." The third statement given before the members was, "Eighty percent of children who die, die from a one-time event." After further testimony relevant to various seizure disorders, sudden infant death syndrome, means by which children accidentally suffocate, and other aspects of fatal child abuse, Dr. Cooper concluded her testimony with the following statement: "It is my medical opinion that the cause of death for Caitlyn Traum was asphyxiation of a non-accidental nature." There was no cross-examination from the defense.

B. Discussion

Appellant challenges Dr. Cooper's testimony on two grounds. First, Appellant asserts that three of Dr. Cooper's opinions that were presented to the members constituted profile evidence. In particular, the defense focused on these statements:

> "if a child is less than four years of age, the most common cause of trauma death is going to be child maltreatment";
>
> "Eighty percent of children who die, die from a one-time event"; and
>
> "Overwhelmingly, the most likely person to kill a child is going to be his or her own biological parent."

Second, Appellant maintains that the military judge erred in admitting Dr. Cooper's testimony because it was based on Dr. Cooper's review of Appellant's behavior in the

emergency room. We review Appellant's arguments in turn to determine whether the military judge abused his discretion in allowing all or part of Dr. Cooper's testimony. See *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).

1. Profile Evidence

Before expert testimony may be admitted, the following factors must be established by the proponent of such testimony:

> (A) the qualifications of the expert, Mil.R.Evid. 702;[5] (B) the subject matter of the expert testimony, Mil.R.Evid. 702; (C) the basis for the expert testimony, Mil R.Evid. 703; (D) the legal relevance of the evidence, Mil.R.Evid. 401 and 402; (E) the reliability of the evidence, *United States v. Gipson*, 24 M.J. 246 (CMA 1987), and Mil.R.Evid. 401; and (F) whether the 'probative value' of the testimony outweighs other considerations, Mil.R.Evid. 403.

Houser, 36 M.J. at 397.

Expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" M.R.E. 702. "The test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony 'to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject[.]'" *Houser*, 36 M.J. at 398.

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[5] At trial, the military judge accepted Dr. Cooper as an expert in the field of forensic pediatrics without objection from defense counsel. Thus, Dr. Cooper's qualifications are not in issue on appeal.

In contrast, "generally, use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials is improper." *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992). See *Brunson v. State*, 349 Ark. 300, 79 S.W.3d 304, 313 (Ark. 2002)(rejecting testimony that the defendant met eight of ten risk factors for batterers likely to kill); *Commonwealth v. Day*, 409 Mass. 719, 569 N.E.2d 397, 400 (Mass. 1991)(child battering profile inadmissible); *State v. Clements*, 244 Kan. 411, 770 P.2d 447, 454 (Kan. 1989)(finding evidence of psychology and treatability of a child sexual offender inadmissible); *United States v. Garcia*, 25 M.J. 159 (C.M.A. 1987)(summary disposition)(rejecting testimony that appellant's psychological profile was consistent with a person who sexually abused children); *United States v. August*, 21 M.J. 363 (C.M.A. 1986) (rejecting a profile of the "usual" sexual child abuser); *Sanders v. State*, 251 Ga. 70, 303 S.E.2d 13 (Ga. 1983)(state cannot introduce evidence of battering parent syndrome); *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981)(evidence placing the defendant within the profile of a battering parent inadmissible). Profile evidence is evidence that presents a "characteristic profile" of an offender, such as a pedophile or child abuser, and then places the accused's personal characteristics within that profile as proof of guilt. *United States v. Rynning*, 47 M.J. 420, 422 (C.A.A.F. 1998).

The question in this case is whether Dr. Cooper's opinions constituted impermissible profile evidence or whether they were admissible opinions of specialized knowledge under M.R.E. 702.[6] Child abuse is an area where

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[6] Appellant did not raise a challenge under Daubert regarding the reliability of Dr. Cooper's methodology or her conclusion of "non-accidental asphyxiation." See *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)*. Therefore, we do not address what impact, if any, a Daubert challenge would have had on the scope and content of Dr. Cooper's testimony.

specialized knowledge regarding pediatric forensics and child abuse may indeed be helpful to members. Children incur all sorts of injuries as they move through infancy to the toddler years and beyond. Thus, a panel might well benefit from an understanding of the methodology doctors use to determine the cause of an infant's injury. In the case of fatal child abuse, the value of such specialized knowledge is equally apparent. Such information helps members discern the critical elements of testimony and place that testimony within an analytic framework. This information may also help disabuse members of preconceptions that might cloud their ability to focus on the evidence presented as opposed to preconceptions about the nature of the offense at issue. In light of this predicate, we believe Dr. Cooper's first two statements fall within the rubric of specialized knowledge that is useful to the members in understanding the evidence and determining a fact in question. This testimony was given in the context of her general description of fatal child abuse. Further, these particular statements relate to the characteristics of the child victim in this case rather than Appellant. Comparable evidence has been admitted in cases involving rape trauma syndrome. See *United States v. Reynolds*, 29 M.J. 105, 111 (C.M.A. 1989). Similarly, evidence of battered child syndrome is often admitted to show that a particular injury "is not accidental or is not consistent with the explanation offered therefore but is instead the result of physical abuse by a person of mature strength." *United States v. White*, 23 M.J. 84, 87 (C.M.A. 1986).

As we explained in Banks, the ban on profile evidence exists because this process treads too closely to offering character evidence of an accused in order to prove that the accused acted in conformity with that evidence on a certain occasion and committed the criminal activity in question. This, of course, is prohibited under M.R.E. 404(a)(1). See *Banks*, 36 M.J. at 161. These two statements by Dr. Cooper do not implicate that concern because they relate to the

characteristics of the child victim in this case rather than Appellant.

What we condemned in Banks was the Government's construction of a syllogism "(major premise, minor premise, and conclusion)" used in persuading the members that the appellant was a child abuser. *36 M.J. at 162 n.11.* In that case, the Government, through its expert witness, presented the major premise that families with a profile of three particular identified risk factors presented an increased risk of child sexual abuse. The Government then established through further testimony the minor premise that Banks and his family fit this profile. Finally, the prosecution argued for the conclusion that since the minor premise established the major premise, the members could not help but decide that Banks was a child abuser. We discern no such tactic in the record of this case.

Testimony setting up a child battering profile must be distinguished from testimony focusing on the characteristics of a battered child. See *Day*, 569 N.E.2d at 400. See also Myrna S. Raeder, The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence, *68 U. Colo. L. Rev. 147, 160 (1997)*(discussing the distinction between battered wife syndrome and evidence of a batterer profile). The former is irrelevant because it is not necessarily true that an accused is a batterer just because the individual fits a certain profile. However, the latter is often helpful in determining a fact in issue. This is especially true when deciding, as in the instant case, whether the child died from a seizure as posited by the defense or whether she was suffocated as alleged by the Government. We conclude Dr. Cooper's testimony was the latter.

Dr. Cooper's third statement, "Overwhelmingly, the most likely person to kill a child is going to be his or her own biological parent," is more troubling. Following Dr. Cooper's testimony and counsel's respective arguments at the

Article 39(a) session, the military judge contextually culled out the testimony he considered profile in nature. Consequently, the military judge attempted to limit Dr. Cooper's testimony to child characteristics of abuse like the history of diagnosing child abuse, fatal versus nonfatal child abuse, and single episode versus multiple episodes of abuse. The judge barred Dr. Cooper from testifying regarding adult characteristics of child abusers, like substance abuse, living in a military environment, and the parent of an unplanned pregnancy.

Nevertheless, Dr. Cooper's statement regarding biological parents clearly reached both the characteristics of the victim as well as the characteristics of the typical offender. It is not enough to say that the Government did not expressly place the accused within the statistic presented, for the accused manifestly fit the statistical pattern presented without the Government connecting the dots. Moreover, while Dr. Cooper's testimony did not come in the form of numeric probability, members might have been left with the impression that if the testimony indicated Appellant's daughter died as a result of child abuse, the probability Appellant committed the offense was "overwhelming," regardless of what specific evidence was presented. In essence, the statement placed a statistical probability on the likelihood that Appellant committed the offense. Thus, we conclude that it was impermissible profile evidence.

However, any error in admitting this statement was harmless. First, the evidence was introduced after Appellant's confession had been admitted and presented to the members. Second, the critical question in this case was whether the victim died by accidental or intentional asphyxiation, not the identity of the perpetrator. Appellant did not contest being alone with the victim at the time of the child's injury.

2. Basis for the Expert's Opinion

Appellant also argues that Dr. Cooper should not have been allowed to give her ultimate opinion on the cause of Caitlyn's death because it was not based solely upon medical evidence, but also rested upon her subjective evaluation of Appellant's grieving conduct. In particular, during the *Article 39(a)* session, Dr. Cooper testified that when forming her opinions she considered the fact that Appellant gave differing accounts regarding Caitlyn's condition to the 911 operator, the paramedics when they arrived at her quarters, and to the hospital personnel when the child arrived at the emergency room.

Dr. Cooper also considered certain statements Appellant allegedly made to witnesses at the hospital as suggestive of an uncharacteristic and inappropriate grief response. For example, Appellant was alleged to have stated to one witness who was trying to console her at the hospital, "I'm just glad I saved the toy receipts." *Traum*, 2002 CCA LEXIS 153 at *4, No. ACM 34225. When this witness commented that the dead child had been a beautiful girl, Appellant stated, "She really was mean. She was mean to her sister and really active." 2002 CCA LEXIS 153 at *4. At root, Appellant argues these remarks were observations lay persons could observe and testify to without medical knowledge. Therefore, Dr. Cooper's testimony was not based on specialized medical knowledge, but ordinary lay observations already offered to the members by non-expert witnesses.

An expert's opinion may be based upon other sources such as "personal knowledge, assumed facts, documents supplied by other experts," or the testimony of witnesses at trial. *Houser*, 36 M.J. at 399; M.R.E. 703. Dr. Cooper's testimony indicates that her opinions were not based solely on Appellant's grieving reaction, but on a tripartite methodology generally accepted as authoritative in the forensic pediatric field. This methodology focuses on the history of events leading to a child's condition, the behavior

of the custodial caretaker, and the physical examination reports including those from the autopsy. Further, the record supports a conclusion that this methodology is relied on by experts in the field of forensic pediatrics. M.R.E. 703 allows experts to rest their opinions on precisely this basis. Therefore, it is clear Dr. Cooper's testimony was rooted in more than lay observations regarding Appellant's conduct. Moreover, it was the eyewitnesses and not Dr. Cooper who testified to the members about Appellant's reactions in the emergency room.

3. Probative Value

However relevant and reliable an expert's testimony might be, such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members[.]" M.R.E. 403. The record indicates that the military judge was acutely aware of the dangers of profile evidence. It is worth noting the military judge's comment at the time he made his ruling with regard to admission of Dr. Cooper's testimony. The judge clearly considered the expert's testimony balanced against "the facts that have come out so far." When Dr. Cooper testified during the trial, the members had already received Appellant's confession, the testimony of the medical examiner, and the testimony of various witnesses concerning statements Appellant made indicating either a lack of grief or at best, an inappropriate grief response. Further, the military judge culled out what he thought was impermissible profiling of Appellant and allowed opinions that were based on the professional literature of the field of expertise and on a methodology accepted by experts in that field. Finally, it is clear the military judge understood the constraint of M.R.E. 403 when he was determining what would or would not be allowed. Based on this record, we cannot say the military judge abused his discretion in weighing the probative value of the

expert testimony against any prejudicial effect it might have presented.

III

Life Without Possibility of Parole

Finally, Appellant takes issue with the advice given to the convening authority by the staff judge advocate. The advice given stated that the "maximum imposable sentence for the offense of [premeditated murder] of which SrA Traum was convicted is life imprisonment, without eligibility for parole." SJAR, para. 6 (emphasis added). Article 56a, UCMJ, *10 U.S.C. § 856a (2000)*, was enacted on November 18, 1997. Appellant was sentenced on September 17, 1999. In light of our recent decision in *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004), life without eligibility for parole was an authorized punishment at the time of Appellant's trial.

Decision

The military judge did not abuse his discretion in admitting the expert testimony or Appellant's confession, nor, was there error in the post-trial processing of Appellant's case. The decision of the United States Air Force Court of Criminal Appeals is affirmed.

GIERKE, Judge, with whom EFFRON, Judge, joins (concurring in part and in the result):

I agree with the majority on all issues except I(A), concerning the necessity to provide rights warnings before a law enforcement agent may ask a suspect to take a polygraph examination.

Regardless of whether, as a general matter, such a request is reasonably likely to elicit an incriminating response, in this case it did not do so. Rather, all of Appellant's incriminating statements were made only after

Special Agent Kraus had informed Appellant of her rights pursuant to Article 31, Uniform Code of Military Justice, *10 U.S.C. § 831 (2000)*, *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and *United States v. Tempia*, 16 C.M.A. 629, 37 C.M.R. 249 (1967), and after Appellant waived those rights.

Voluntariness is the touchstone for determining a subsequent statement's admissibility even where the suspect has let the cat out of the bag in a previous unwarned but voluntary statement. See *United States v. Lichtenhan*, 40 M.J. 466 (C.M.A. 1994). In this case, Appellant made no incriminating statements before Special Agent Kraus gave her a complete rights warning and obtained a waiver of those rights. Because Special Agent Engelman's request resulted in no taint, it did not affect the Appellant's admissions to Special Agent Kraus. There is, therefore, no need to resolve issue I(A). I reserve judgment on that legal issue.

ERDMANN, J. (concurring in part and in the result):

I agree with the majority on all issues other than the nature of the three statements made by Dr. Cooper. In the context of this case, these statements are improper profiling evidence in that they characterized Senior Airman Traum as a person who would both abuse and kill her natural child.

I recognize the distinction made by the majority between testimony relating to the characteristics of a child victim and the characteristics of an accused. However, testimony that in isolation would not constitute "profiling" evidence may well become "profiling" when heard in the context of a particular case. This is such a case.

Before the members, Dr. Cooper first stated that "eighty percent of children who die, die from a one[-]time event." Because there was no evidence of prior abuse and unrefuted evidence that Traum had been alone with her baby prior to the death, this statement had the effect of rendering it 80%

likely that Traum was the cause of the "one[-]time event" that resulted in her baby's death.

Dr. Cooper's next statement was that "if a child is less than four years of age, the most common cause of trauma death is going to be child maltreatment." The prosecution had already established that the baby was under four, showed evidence of physical trauma and was alone with Traum during the time any trauma could have been inflicted. In conjunction with the earlier evidence, this statement identified the death as resulting from trauma and identified Traum as the only person who could have inflicted the trauma. These two conclusions were virtually inseparable and the second is clearly beyond the realm of permissible expert testimony.

As noted by the majority, Dr. Cooper's final statement is certainly the most troublesome: "Overwhelmingly, the most likely person to kill a child is going to be his or her own biological parent." Contextualized, Dr. Cooper's statement meant that Traum, as the biological parent, was overwhelmingly the most likely person to have killed her child. An expert may not testify that the accused committed the crime being tried, and Dr. Cooper should not have been permitted to do through presentation of "information or data" that which she could not have done through direct testimony. See *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003)(noting "fundamental rule of law that experts may not testify as to guilt or innocence").

In *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992), this Court condemned "use of any characteristic 'profile' as evidence of guilt or innocence in criminal trials." We defined the nature of such improper profile evidence to go beyond character evidence per se:

> Inadmissible profile evidence does not merely address a profile where the factors relate only to a "character trait" of the accused. The factors in

> the profile may be any information or data so as to place appellant in an alleged "group" of persons who have committed offenses in the past.

Id. at 163. While all three of Dr. Cooper's statements constitute "profiling" evidence, taken together they certainly could cause the members to classify Traum as a child abuser and killer. Consistent with our holding in Banks, these statements carry the danger of prejudice "greatly" outweighing any probative value the information may have. *Id.* at 161. Evidence such as this turns the trial of criminal charges away from one of facts to "a litmus-paper test for conformity with any set of characteristics, factors, or circumstances." *Id.*

Finally, in this case the military judge admitted the three statements because it was "counterintuitive" that a parent would be involved in the death of his or her child. This ruling reveals that the military judge admitted the evidence not to show that the child's death was a crime, but to show specifically that the parent was the perpetrator. The very purpose for which the statements were admitted was to identify Traum as one of a very limited group who would kill her child based on probabilities and inferences rather than upon the facts of the case.

Nevertheless, for the same reasons that the majority found the error with respect to the admission of Dr. Cooper's third statement to be harmless, I find that the error relating to the admission of all three statements to be harmless. Therefore, I join in affirming the decision of the court below.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEPHANIE R. TRAUM,
United States Air Force

ACM 34225

June 28, 2002, Decided

COUNSEL: For Appellant: Captain Shelly W. Schools (argued), Colonel James R. Wise, Colonel Beverly B. Knott, and Lieutenant Colonel Timothy W. Murphy.

For the United States: Major Jennifer R. Rider (argued), Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Bryan T. Wheeler.

JUDGES: Before YOUNG, BRESLIN, and HEAD, Appellate Military Judges. Judge HATTRUP sat for oral argument, but left the court without voting on this opinion. Judge HEAD was substituted for Judge HATTRUP.

OPINION OF THE COURT

YOUNG, Chief Judge:

Officer and enlisted court members convicted the appellant of the premeditated murder of her daughter, in violation of Article 118, UCMJ, *10 U.S.C. § 918.* he court members sentenced the appellant to a dishonorable

discharge, confinement for life, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. The convening authority approved the adjudged sentence, except for the reprimand. The appellant assigns four errors: (1) The appellant's oral and written admissions were obtained in violation of Article 31, UCMJ, *10 U.S.C. § 831;* (2) An expert impermissibly opined that Caitlyn's death was "non-accidental"; (3) The appellant deserved additional credit for illegal pretrial punishment; and (4) This Court should order new post-trial processing of the case. We heard oral argument on the first two issues. We correct the military judge's arithmetic in determining pretrial confinement credit. Otherwise, we affirm.

I. The Facts

The appellant and her husband John married while both were members of the Air Force. John separated from the service so that duty assignments would not separate the couple. At the time of the marriage, the appellant already had a daughter, Dallas, from a previous relationship. The couple had one child of their own, Caitlyn, who was 18 months old. The family moved into military quarters at the Gunter Annex to Maxwell Air Force Base (AFB), Alabama, but due to marital discord, the appellant later threw John out. He moved in with a co-worker.

On 20 December 1998, John, the appellant, and the two children went shopping for Christmas gifts and then went out to dinner. When they returned home, John played with Caitlyn while the appellant wrapped the Christmas gifts in the bedroom. Dallas, who was 5 years old at the time, was asleep on the sofa. John put Caitlyn on the sofa next to her sister, turned the television on, and then returned to the bedroom where he had sex with the appellant. When John left the house at 2245, Caitlyn was sleeping peacefully on the sofa.

The appellant and the children were scheduled to leave the next day for a Christmas visit with her parents. At 0730

on 21 December, the appellant called the childcare facility to notify them that she was going on vacation and would not be dropping the kids off. At approximately 0835, the appellant telephoned emergency services to report that Caitlyn was not breathing. When the paramedics arrived, Caitlyn's body was cool to cold.

Despite the efforts of paramedics and physicians, they could not revive Caitlyn. She was pronounced dead at 0944 at the hospital. Major Stamnas, one of Caitlyn's treating physicians, advised the appellant and John that their baby was dead, and asked if there was anything he could do for them. The appellant did not cry at the news of her daughter's death. She told Major Stamnas that she wanted orders "out of here." A hospital social worker talked to the Traums to see if she could help them in their grief. She put her arm around the appellant and told her she was "so sorry that this has happened." The appellant looked at the social worker and said, "I'm just glad I saved the toy receipts." The appellant repeated this statement and then talked about insurance and a burial place. The social worker invited the Traums to spend a few moments with Caitlyn before the body was sent to the morgue. John went, but the appellant declined to go. "I've already seen her. I don't want to see her." The social worker told them that she had seen Caitlyn and that she was a beautiful girl. The appellant replied, "She really was mean. She was mean to her sister and really active."

While at the emergency room (ER), the appellant again telephoned the child care center and told them that Caitlyn was dead. She also notified her insurance company.

At trial, the prosecution introduced evidence that, while attending leadership school, the appellant referred to John as her ex-husband, even though they were still married. Approximately one month before Caitlyn died, the appellant told members of her leadership school class that she loved

one of her kids less than the other "because it looked like her ex-husband."

II. The Admissions

On 12 January 1999, the appellant telephoned agents of the Air Force Office of Special Investigations (AFOSI) to inquire about the status of the investigation into Caitlyn's death. The agents asked if they could discuss it at their office. She agreed to visit the AFOSI on 13 January.

The appellant arrived at the AFOSI office at approximately 0830, where she met Special Agents Gage and Engleman. She asked them about the status of the investigation. They told her the results of the autopsy were pending and they had interviewed a number of witnesses. She claimed she was interested in getting the autopsy report and death certificate so her unit could process a humanitarian reassignment. The agents also discussed with the appellant their relationship with the Alabama State Medical Examiner's Office, the condition of her other daughter, Dallas, and the appellant's interest in computers. The agent's then asked her if she would be willing to take a polygraph. Special Agent (SA) Engleman explained that the polygraph could eliminate her as being involved in Caitlyn's death and could speed up the processing of the death certificate. The appellant said that she did not want to discuss the details of the night her daughter died. SA Engleman told her that the polygrapher, SA Kraus, would only be interested in some key details and that she could raise her concerns with him. SA Kraus entered the room and was introduced to the appellant. After a couple of minutes of small talk, the appellant agreed to talk to SA Kraus.

SA Kraus and the appellant moved into another room. SA Kraus advised the appellant that she was suspected of causing the death of Caitlyn and of her rights to counsel and to remain silent. The appellant waived her rights and agreed to be interviewed and polygraphed. She did not indicate any hesitancy in talking to SA Kraus, or in taking the polygraph,

then or any other time during the interview. She never invoked her right to remain silent or her right to have an attorney.

The appellant ultimately admitted to SA Kraus that she killed Caitlyn. At trial, the military judge denied the defense motion to suppress the confession, and evidence of the appellant's admission was presented to the court members.

The appellant alleges that her statement to SAs Gage and Engleman, that she did not want to discuss the details of 20-21 December, "constituted a clear and unequivocal exercise of her right to remain silent." She asserts that SA Engleman lied "by advising her that she would not 'necessarily' need to discuss the details of that evening." The appellant avers that this lie was an unlawful inducement and the military judge erred by failing to suppress the resulting admissions.

Generally, an involuntary statement "may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress." Mil. R. Evid. 304(a). A statement is involuntary if, *inter alia*, it was obtained in violation of the accused's rights under Article 31, UCMJ, *10 U.S.C. § 831,* or is the product of unlawful inducement. Mil. R. Evid. 304(c)(3).

> A person . . . who is required to give warnings under Article 31 may not interrogate or request any statement from . . . a person suspected of an offense without first: (1) informing [her] of the nature of the accusation; (2) advising [her of] the right to remain silent; and (3) advising [her] that any statement made may be used as evidence against [her] in a trial by court-martial.

Mil. R. Evid. 305(c). An interrogation "includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Mil. R. Evid. 305(b)(2). *See Rhode Island v.*

Innis, 446 U.S. 291, 300-01, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

If an accused alleges her confession was involuntary because she was denied her right to counsel, we review the military judge's decision to admit the confession for an abuse of discretion. *United States v. McLaren*, 38 M.J. 112, 116 (C.M.A. 1993) (applying an abuse of discretion standard). If, however, an accused asserts that her confession was involuntary because of coercive police activity, we review the issue de novo. *United States v. Bubonics*, 45 M.J. 93, 94 (1996) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991)).

When SA Gage and SA Engleman met with the appellant, they did not interrogate her within the meaning of Mil. R. Evid. 305(b)(2). The agents met with the appellant at her request--she wanted an update on the status of the case and assistance in moving the autopsy to completion so that a death certificate could be issued. No incriminating response from the appellant was sought, obtained, or was reasonably a consequence of the discussions. Under the circumstances, asking the appellant if she would be willing to take a polygraph was not an interrogation and did not require Article 31 warnings. *Cf. McNeil v. Wisconsin*, 501 U.S. 171, 182, 115 L. Ed. 2d 158, 111 S. Ct. 2204 n.3 (1991) (noting Supreme Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'"). As the appellant was a suspect and SA Kraus was seeking an incriminating response, he was required to warn her of her rights prior to administering the polygraph. That is what he did. Furthermore, the appellant's statement that she did not want to discuss all the details of what happened on 20-21 December was not an "unequivocal invocation of her right to remain silent." She agreed to talk to the polygrapher; she just wanted to be able to limit what she would talk about. SA Gage and SA Engleman did not unlawfully induce the appellant to make any statements.

They told her the truth; she could limit the discussion, if she so wished. She merely had to explain to the polygrapher the conditions on her willingness to be interviewed. The military judge did not err in refusing to suppress the appellant's admissions.

III. The Expert's Opinion

Prior to trial, the appellant moved the court to exclude the testimony of Dr. Sharon Cooper, a forensic pediatrician. After an extensive and hotly litigated hearing, the military judge denied the motion, but severely limited the scope of Dr. Cooper's testimony. The appellant asserts the military judge abused his discretion by permitting Dr. Cooper to testify that Caitlyn's death was the result of non-accidental asphyxiation because "the conclusion was based, in part, on the expert's credibility assessment of appellant, and the use of impermissible profile evidence, rather than objective medical findings."

In the evidentiary hearing, Dr. Cooper testified that there are three factors to consider in diagnosing fatal child abuse: (1) the history of the complaint and any medical treatment provided--including whether the childcare providers change their stories and whether there was any delay in seeking medical treatment; (2) whether the behavior of the caregiver shows the appropriate concern for the child--including appropriate grieving in cases of death; and (3) the physical examination on presentation at the hospital and the autopsy. She opined that Caitlyn died as a result of asphyxiation by suffocation. Her opinion was based on the following facts: (a) The death could not be explained by other medical causes; (b) The history the appellant provided to EMT personnel was inconsistent with what she provided to the hospital staff; and (c) The trauma to Caitlyn's upper lip, discovered during the autopsy, was similar to that found in other child suffocation cases she had examined. Although she did not specify it as a factor on which she based her conclusion that Caitlyn's death was non-accidental, Dr.

Cooper noted that the appellant's grieving response was inappropriate. Dr. Cooper specifically rejected the efforts of the defense counsel to suggest that a diagnosis of child abuse should be made on any of the factors individually.

Dr. Cooper limited her testimony to the scope permitted by the military judge. Dr. Cooper never testified before the members that she based her conclusion that Caitlyn's death was non-accidental on the appellant's credibility or on profile evidence. Thus, it appears that the appellant is now trying to attack Dr. Cooper's testimony as being *based* on impermissible factors.

A witness with scientific, technical, or other specialized knowledge is allowed to testify if her testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid. 702. In providing an opinion, an expert may rely on information made known to her. If the facts or data made known to her are of the "type reasonably relied upon by experts in the particular field in forming opinions . . ., the facts or data need not be admissible in evidence." Mil. R. Evid. 703. Otherwise admissible expert testimony is "not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Mil. R. Evid. 704.

The proponent of expert testimony must establish, *inter alia*, the qualifications of the expert, the basis of the expert testimony, the legal relevance of the evidence, and the reliability of the evidence. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). Even then, the evidence is not admissible unless the military judge determines that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice. *Id.* at 399-400 (citing Mil. R. Evid. 403).

We will not overturn the military judge's decision on the admission of expert testimony unless we are convinced he abused his discretion. *United States v. Raya*, 45 M.J. 251, 252 (1996). Because of our statutory authority to "determine

controverted questions of fact" under Article 66(c), UCMJ, *10 U.S.C. § 866*(c), we are not required to defer to the military judge's findings of fact. However, we normally do so unless they are clearly erroneous. *See United States v. Vaughters*, 42 M.J. 564, 566 (A.F. Ct. Crim. App. 1995). We review his conclusions of law de novo. *United States v. Ayala*, 43 M.J. 296, 298 (1995).

Generally, it is error to admit evidence that tends to show that the typical perpetrator of a criminal offense has certain characteristics and that this particular accused fits a "profile" that is consistent with that of the typical perpetrator. *United States v. Banks*, 36 M.J. 150, 161 (C.M.A. 1992) (citing *United States v. Garcia*, 25 M.J. 159 (C.M.A. 1987) (summary disposition); *United States v. August*, 21 M.J. 363, 364 (C.M.A. 1986)). An expert witness is not permitted to act as a human lie detector for the court-martial. *United States v. Birdsall*, 47 M.J. 404, 410 (1998). But, Dr. Cooper neither acted as a human lie detector nor tried to establish that the appellant fit the typical profile of a child abuser.

In her testimony before the members, Dr. Cooper started by explaining the different types of child maltreatment--neglect, physical abuse, sexual abuse, and emotional abuse. She noted that studies showed that in 80 percent of fatal child abuse incidents there was no previous history of such abuse and that children are statistically more likely to be killed by their biological parents than by a stranger. Dr. Cooper then testified that, in performing a fatality review in an infant death, there were basically three considerations in determining the cause of death: (1) the autopsy; (2) social service information, such as information about the family and school history, if any; and (3) the crime scene report done by law enforcement, if any. On the other hand, if a child is presented to an ER dead, physicians would look at matters a little differently: (1) the history provided by the child care provider; (2) the behavior of the persons who brought the child to the ER; and (3) the physical examination

and subsequent autopsy of the child. Dr. Cooper never explained these factors in detail or correlated the facts of the appellant's case to those factors, nor did she provide any opinion as to whether the appellant was the likely source of injuries that caused Caitlyn's death.

Dr. Cooper explained that the most common causes of child deaths were SIDS (sudden infant death syndrome), child abuse, and accident. She stated that SIDS normally occurs in children under the age of 6 months. She ruled out several different conditions "known to shorten the life-span," such as seizure disorders and infections, as causing Caitlyn's death. She next explained the four different types of asphyxiation--suffocation, strangulation, overlying, and chemical. After going over the evidence of the case, she eliminated each type with the exception of suffocation. She then turned her attention to whether the suffocation was accidental or non-accidental. Dr. Cooper briefly explained the process of suffocation, noting the length of time necessary to die of suffocation and the fact that a person, even a child, would struggle mightily to avoid suffocation. Based on her review of the evidence, Dr. Cooper opined that Caitlyn's death was as a result of non-accidental suffocation.

The appellant contends that Dr. Cooper's conclusion was based on impermissible evidence. She asserts that "inconsistent histories and improper grieving response--are nothing more than profile evidence." We disagree.

Evidence that an accused fits an incriminating profile is inadmissible under Mil. R. Evid. 404(a),

> not because it is irrelevant, but because it is so weighty that it might prevent the finders of fact from considering the other more important historical evidence in the case. Bad general character evidence has the tendency of encouraging finders of fact to convict because of

> the accused's extrinsic conduct as opposed to his charged conduct.

Stephen A. Saltzburg [*17] et al., *Military Rules of Evidence Manual* 524 (4th ed. 1997) (citing *Michelson v. United States*, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)). The rule should not bar profile evidence that is not itself likely to arouse sympathy or hostility. 1 John W. Strong et al., *McCormick on Evidence* § 206 (5th ed. 1999). Dr. Cooper's testimony, that there was no previous history of abuse in 80 percent of the fatal child abuse incidents and that children are statistically more likely to be killed by their biological parents than by strangers, are such facts. This testimony was relevant to explain to court members counterintuitive facts--parents actually kill their own children, and there isn't necessarily a history of abuse prior to the killing. Neither of these facts was likely to arouse hostility toward the appellant.

We also reject the appellant's argument that Dr. Cooper's testimony, which was based on "inconsistent histories and improper grieving response," was improper because it was "nothing more than profile evidence." Dr. Cooper did not rely on the appellant's *character* to determine the cause of death. Instead, she relied on the medical evidence and appellant's *conduct* after the death. This conduct--providing inconsistent histories of the period surrounding the death and a grieving response that was outside that normally seen in parents whose child dies--was relevant evidence, both to Dr. Cooper's evaluation of the cause of death and the court members' determination of the charge against the appellant. The evidence had the tendency to establish that the appellant killed her infant daughter.

The military judge did not err in permitting Dr. Cooper to testify. He appropriately limited her testimony before the members. But, that did not mean she could not rely on the information not admitted into evidence as a basis for her

opinions. *See* Mil. R. Evid. 703. Dr. Cooper provided sufficient foundation to establish that the consistency of the history and the behavior of the childcare provider are factors forensic pediatricians consider in reaching a conclusion on the cause of a child's death.

We reject the defense contention that Dr. Cooper acted as a human lie detector. She was not concerned with which of the histories of the incident recited by the appellant was accurate. Her conclusion that foul play may have been involved was based on the fact that there were inconsistencies.

IV. Pretrial Punishment Credit

At trial, the appellant moved the court to order her release from pretrial confinement and to award additional confinement credit because of illegal pretrial punishment. The military judge refused to release the appellant from pretrial confinement, but awarded her additional confinement credit because of her maximum custody status and the conditions of her pretrial confinement. The appellant claims the military judge failed to award her sufficient credit for the illegal punishment. As the appellant was sentenced to confinement for life, any credit for illegal pretrial punishment will only affect the date she becomes eligible for parole. Of course, we could still consider any illegal pretrial punishment in determining whether the appellant's sentence is appropriate.

A. Facts

The appellant was ordered into pretrial confinement on 13 January 1999, immediately after she confessed to suffocating Caitlyn. She was placed in maximum custody at the Maxwell AFB confinement facility. On 15 January, the pretrial confinement reviewing officer determined continued pretrial confinement was appropriate. On 19 January, the appellant's defense counsel complained to the staff judge advocates (SJA) of both the special and general court-martial

convening authorities about the appellant's maximum-security status. The appellant's custody status was not changed.

On 21 January, the defense counsel asked the convening authority to order a sanity board to evaluate the appellant's mental health. The sanity board was conducted at Lackland AFB, Texas, from 8-13 February. The appellant was held in maximum custody in the Lackland AFB confinement facility during this period.

On 12 March, the defense asked that the appellant's custody status be downgraded from maximum to medium-in. By letter dated 15 March, the Security Forces commander, Lieutenant Colonel (Lt Col) Simmons, denied the request. Lt Col Simmons admitted that the appellant did not, "technically," meet the criteria for maximum custody status outlined in Air Force Instruction (AFI) 31-205, *The Air Force Corrections System* P 27.1 (16 April 1997). He asserted that he needed to consider many factors in determining an inmate's custody status, including "indications of emotional instability or disturbance, irresponsibility, prior escapes, AWOLs, maturity, *degree and severity of offense, and charges still pending.* On the other hand, you should also consider *an inmate's history of emotional stability* and demonstrated sense of productive work." App. Ex. XXIX, Atch 5 (quoting Air Force Pamphlet (AF Pam) 31-221, *Air Force Corrections Program* § B2.3.1 (31 Mar 1995) (emphasis in Lt Col Simmons' letter)). Lt Col Simmons did not explain how these factors applied to the appellant, other than that, "Regardless of how it was done, the alleged offense was not an accident, and therefore *is* an act of violence." *Id.* (emphasis in original).

On 17 March, at the request of the Chief, Military Justice, at the base legal office, the defense submitted a letter from the Chief, Life Skills Clinic, stating that the appellant was not then a serious danger to herself. On 26 March, the defense counsel renewed his request, to the base staff judge

advocate (SJA) and Lt Col Simmons, that the appellant's custody status be downgraded. He attached the 17 March letter from the Chief, Life Skills Clinic. On 22 April, the defense counsel wrote to the base SJA, Lt Col Simmons, and the Air University (GCM) SJA complaining that he had not received a response to his earlier requests that the appellant's custody status be downgraded. It appears from the record that these requests also went unanswered.

At a pretrial hearing on 4-5 June 1999, conducted pursuant to Article 39(a), UCMJ, *10 U.S.C. § 839*(a), Lt Col Simmons testified that he considered three issues in determining the custody classification of a prisoner: (1) whether the individual is a flight risk; (2) whether the individual is a risk to herself or others; and (3) whether the individual is at risk of injury from others. He decided maximum security status was appropriate for this appellant for the following reasons: (1) The appellant and her husband had a history of domestic disputes, he remained in the area and, since the child was dead, he could be a possible source of danger for the appellant; and (2) Based on her situation and the nature of the pending charges, the appellant could be a risk to herself as well as a flight risk.

The military judge determined that maximum custody status was not appropriate after 26 March 1999:

> I note that, by that time, she had been in pretrial confinement for over 2 months; she had traveled to and from Lackland without a problem; she had been exercising outside her cell on a daily basis since the end of January; she had attended the Article 32 hearing in this case; she had met with her counsel as needed, made phone calls, received visitors. In short, by that time she had demonstrated that maximum-custody was no longer needed.

Although he ruled that the government did not intend to punish the appellant by the conditions of her confinement, the judge found four specific actions of which the appellant complained amounted to a violation of Article 13, UCMJ, *10 U.S.C. § 813,* for which she was entitled to credit against her confinement:

(1) One days' credit for each of three weekly phone calls for which the government could provide no legitimate reason the appellant was not permitted to make--a total of 3 days' credit.

(2) One days' credit for each of three days the appellant spent wearing the same colored jumpsuit as a post-trial confinee--a total of 3 days' credit.

(3) Eight days' credit for the failure of the government to permit the appellant to get her hair cut to conform to Air Force regulations between 1 April and 2 June 1999.

(4) Two and one-half days' credit for each day the appellant was in maximum custody, from 26 March through 4 June 1999--a total of 177.5 days' credit (the military judge incorrectly estimated the total credit for this particular violation of Article 13, UCMJ, as being 190 days).

B. The Law

Article 13, UCMJ, *10 U.S.C. § 813* prohibits punishment before trial.

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

"By its terms and clear implications, Article 13 prohibits two types of activities involving the treatment of an accused prior to trial." *United States v. McCarthy*, 47 M.J. 162, 165 (1997). First, it prohibits the imposition of punishment or penalty prior to trial. Second, it proscribes infliction of unduly rigorous circumstances during pretrial detention. *Id. See United States v. Fricke*, 53 M.J. 149, 154 (2000), *cert.* **[*25]** *denied, 531 U.S. 993, 148 L. Ed. 2d 457, 121 S. Ct. 484 (2000); United States v. Allen*, 33 M.J. 209, 214 (C.M.A. 1991).

"Whether particular conditions amount to punishment before trial is a matter of intent, which is determined by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'" *United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)). "In the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective." *Id.* (quoting *Wolfish*, 441 U.S. at 539 n.20) (alteration in original).

> If a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Wolfish, 441 U.S. at 539 (footnote omitted).

At trial, an accused bears the burden of proving, by a preponderance of the evidence, that the conditions of her confinement constituted illegal pretrial punishment. *See* Rule for Courts-Martial (R.C.M.) 905(c)(1) and (2); *United States v. Mosby*, 56 M.J. 309, 310 (2002). On appeal, claims of illegal punishment qualify for independent review. *McCarthy*, 47 M.J. at 165. But, the appellant still bears the burden of establishing by a preponderance of the evidence that she was entitled to additional confinement credit. *Mosby*, 56 M.J. at 310. On questions of "basic, primary, or historical facts," such as the conditions of the confinement and whether there was intent to punish, appellate courts normally defer to the trial judge. *McCarthy*, 47 M.J. at 165. We will not overturn his findings unless they are clearly erroneous. *Mosby*, 56 M.J. at 310 (citing *United States v. Smith*, 53 M.J. 168, 170 (2000)). But, whether a person was subjected to illegal punishment is a matter we review de novo. *Id.*

C. Discussion

The appellant's main complaint concerned consequences of being in maximum custody status. She was not singled out for special treatment. She was treated in accordance with the rules applicable to any maximum custody grade inmate. The appellant's other complaints, concerning the missed telephone calls, having to wear the same uniform as a sentenced prisoner for 3 days, and not being able to get her hair cut, were *de minimis* and did not warrant pretrial punishment credit. *See United States v. Corteguera*, 56 M.J. 330 at 334; *Fricke*, 53 M.J. at 155 (citing *Wolfish*, 441 U.S. at 539 n.21).

We accept the military judge's findings concerning the conditions of the appellant's confinement and the lack of intent by government officials to punish her prior to trial. They are not clearly erroneous. *See Mosby*, 56 M.J. at 310. There is no evidence that the conditions imposed on confinees in maximum custody status were intended as

punishment or were not "reasonably related to a legitimate governmental objective." *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989) (quoting *Wolfish*, 441 U.S. at 539). *See McCarthy*, 47 M.J. at 165. Therefore, our review is limited to whether the assignment of the appellant to maximum custody status is reasonably related to a "legitimate governmental objective." If it is not, we may infer that her assignment to maximum custody status was intended as punishment. *Wolfish*, 441 U.S. at 539.

The appellant concedes that maximum custody status was appropriate from the inception of her pretrial confinement (13 January) until 29 January. But, on 21 January, the defense requested a sanity board. It is difficult to imagine how a decision to retain in maximum custody status an accused charged with murder, whose sanity and competence has been called into question by her own attorneys, can be labeled "arbitrary or purposeless." *Id.* Furthermore, the fact that the appellant later was found to be competent and sane does not revise the facts known to the confinement authorities at the time of classification. *See McCarthy*, 47 M.J. at 168.

The appellant failed to establish that, by assigning her to maximum custody status, the confining authorities intended to punish her or that the decision was so arbitrary or purposeless as to permit an inference that her custody classification was meant as punishment.

D. The Credit

Although not raised by the appellant, we note that the military judge made a mathematical error in determining the appellant's confinement credit. He determined she was entitled to 307 days' credit towards any sentence to confinement. The SJA recommended the convening authority give the appellant "administrative credit for having served 307 days as directed by the military judge." In his action, the convening authority "credited" the appellant with "307 days for pretrial confinement against the sentence to

confinement." *But see* Air Force Instruction 51-201, *Administration of Military Justice* P 9.8.3 (2 Nov 1999) (requiring convening authority to note in his action *only illegal* pretrial confinement).

Based on the military judge's rulings, we find the following is the appropriate pretrial confinement credit:

(1)	Days for the miscellaneous minor infractions	14
(2)	Credit for days illegally in maximum custody (72 days x 1 1/2)	108
(3)	Credit for days in pretrial confinement (See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984)	246
		Total 368

As the *Allen* credit is applied automatically by the confinement facility, the convening authority's action need only account for the 122 days of illegal pretrial punishment. *AFI 51-201 P 9.*8.3.

V. Post-Trial Processing

The appellant asks this Court to order new post-trial processing for the following reasons: (1) The staff judge advocate's recommendation (SJAR) incorrectly advised the convening authority that the maximum punishment was life without parole; (2) There was no addendum to the SJAR; (3) There is no evidence that the convening authority either received or considered the appellant's clemency submissions; and (4) The record of trial is missing four pages from the clemency submissions.

A. Confinement for Life without Parole

A court-martial may adjudge a sentence of confinement for life without eligibility for parole in any case in which confinement for life may be adjudged. Article 56a, UCMJ, *10 U.S.C. § 856a.* However, a court-martial may not

adjudge a sentence that exceeds "such limits as the President may prescribe for the offense." Article 56, UCMJ, *10 U.S.C. § 856*. The appellant contends that life without the eligibility for parole is not an authorized punishment until the President specifically adopts it.

A military member convicted of premeditated murder "shall suffer death or imprisonment for life as a court-martial may direct." Article 118(4), UCMJ, *10 U.S.C. § 918*(4). Life without eligibility for parole is a lesser sentence than death. Although the case was referred to a court that was not authorized to adjudge death, neither the President nor the convening authority limited the sentence to life imprisonment with the possibility of parole. Therefore, the SJA was correct in advising the convening authority that life without parole was an authorized punishment for premeditated murder. Regardless, the appellant failed to demonstrate prejudice. The appellant did not receive a sentence of life without parole and she failed to establish that the convening authority would have acted differently if life without parole was not an authorized punishment in her case. Article 59(a), UCMJ, *10 U.S.C. § 859*(a).

B. The Remaining Issues

The appellant was correct in asserting that the record of trial as submitted to this Court did not contain an addendum to the SJAR, that there was no evidence the convening authority either received or considered the appellant's clemency submissions, and four pages were missing from the clemency submissions. After the appellant submitted her brief to this Court, the appellee established that an addendum had been prepared and provided to the convening authority, and the convening authority had received and considered the appellant's clemency submissions before taking action on the case. The appellee also provided this Court the missing pages of the clemency submission.

VI. Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The appellant will be credited with a total of 368 days' confinement (122 days of which are for illegal pretrial punishment). The approved findings and sentence are

AFFIRMED.